UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION15

* * * * * * *		
EKHAYA YOUTH PROJECT, INC.	*	
and	*	Cases 15-CA-155131 15-CA-162082
DALANA ZIPPORAH MINOR, an Individual	*	
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* * * * * * *		

EKHAYA YOUTH PROJECT, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

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I. STATEMENT OF THE CASE

Respondent, Ekhaya Youth Project, Inc. ("EYP"), files this Brief in support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") in this matter dated July 15, 2016.[1]

EYP's Exceptions are narrowly addressed to (1) a procedural objection which will be reached only if the Decision of the ALJ is reversed or modified as to the attempted claim on behalf of one Mr. Nicholas Davis, and (2) three specific rules of EYP which the ALJ found to violate Section 8(a)(1) and the Remedy, Order and proposed Notice to Employees issued by the ALJ upon those findings.

Because of the narrow focus of EYP's Exceptions, EYP will present its counter-statement of the case in its Answering Brief to the Exceptions filed on behalf of the General Counsel.

II. ARGUMENT

1. In the event that the ALJ's Decision may be reversed or modified as to its finding that the termination of Nicholas Davis did not violate the Act and its dismissal of the Complaint allegations that EYP violated the Act in terminating Mr. Davis, EYP re-urges its opposition to the General Counsel's proposed amendment of the Consolidated Complaint on the morning of the hearing to add a charge of unlawful termination of Mr. Davis and to pray for remedies in connection with that new charge.

The Office of the General Counsel proposed on the morning of the hearing in this matter to amend the Consolidated Complaint to add a charge of unlawful termination of Nicholas Davis (a gentleman who has sat on the sidelines since June 23, 2015, when the charging party, Ms. Minor solicited him and another terminated employee, Ms. McGrew to join Ms. Minor's claim,

[1] References to the Judge's Decision are designated as "JD" followed by the appropriate page and line numbers. References to the Transcript are designated as "Tr." followed by the appropriate page numbers. References to exhibits are designated either as "GC Ex." or "EYP Ex." followed by the appropriate exhibit number.

and even after he spoke with Board agents in October 2015, (Tr., p. 286) and to pray for remedies on his behalf in connection with that new charge. (Tr. 6-10).

EYP objected to the proposed amendment on the grounds that it was untimely under Section 10(b), unjust under Board Rule 102.17, and a denial of procedural due process to require EYP to defend a new charge with additional monetary exposure "on the fly," so to speak. (Tr. 13-17).

The Administrative Law Judge took the motion under advisement (Tr. 18) and EYP further submitted on its opposition in EYP's Post-Hearing Brief.

The ALJ ultimately found that the termination of Mr. Davis did not violate the Act and dismissed the Complaint allegation that EYP violated the Act in terminating Mr. Davis. (JD 12: 1, 14: 6-7, 16: 7-8). Because of this alternative finding, the ALJ did not address the General Counsel's proposed amendment on the morning of hearing to add allegations and charges on behalf of Mr. Davis and/or EYP's opposition thereto, that is to say, the matter taken under advisement by the ALJ. (JD 12: fn. 13).

Only in the event that the ALJ's Decision as to Mr. Davis may be reversed or modified, EYP re-urges and asserts it opposition to the General Counsel's amendment to the Consolidated Complaint on the morning of trial with reference to Mr. Davis, which objection has yet to be addressed.

Board Rule 102.17 would seem to permit amendments at any time, but only "on terms that are just." In the case at hand, no just terms were able to be considered and none can now be considered. Basically, EYP was required to defend without notice and not even a written complaint or an opportunity to plead any special defenses.

The Office of General Counsel submits *Redd-I, Inc.*, 290 NLRB 1115, as support for the proposed amendment on the morning of hearing.

In *Redd-I*, the Board reversed the ALJ to hold that it would have allowed the General Counsel to amend the Complaint at the hearing and litigate as to the discharge of an additional employee even though the additional employee's discharge occurred more than 6 months before the motion to amend. The Board opined that Section 10(b) would not be a bar if "the alleged violation appears to be closely related to allegations of that charge [a timely filed charge]." *Id.*, at 1115. Since there was no evidence taken by the ALJ after his denial of the proposed amendment, the Board remanded. Therefore, *Redd-I*, itself, is not instructive as to when a new charge may be sufficiently intertwined with a timely filed charge to be considered "closely related."

In the case at hand, there is simply not enough information as to any protected concerted activity of Ms. Minor or Mr. Davis upon which to approach the 'closely related" question. While not controlling, they were discharged on different dates and for not all together the same reasons.

While *Redd-I* will, at first blush, be compelling to the Board, consideration should be given as to whether *Redd-I* is supportable in view of *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007). While *Ledbetter* was superseded in part by the *Lily Ledbetter Fair Pay Act*, its legal principles remain controlling.

Ledbetter addresses the statute of limitations in Title VII cases which is similar to Section 10(b) under the NLRA. The 6-month trigger under Section 10(b) is "from any unfair labor practice." The 180-day trigger under 42 U.S.C.A. §2000e-5(e)(1) is from "the alleged unlawful employment practice."

The Court in *Ledbetter* held that the time for filing a charge begins when a discrete discriminatory act occurs such as termination, failure to promote, denial of transfer, or refusal to hire.

Under the rationale of *Ledbetter*, Mr. Davis' proposed charge and complaint would be barred by Section 10(b), coming as it does some 10-plus months after his June 22, 2015 discharge, the alleged discrete discriminatory or retaliatory act.

Even if the Board limits its consideration to *Redd-I* and deems the charges closely related, Section 10(b) is not the only bar at issue. The Board in *Redd-I* recognized that the Constitutional guarantee of Due Process yet looms over Section 10(b), but was able to avoid an actual determination as to whether the guarantee of procedural due process would permit the amendment to add a new charge and, particularly, a new Charging Party, at the hearing since the ALJ in that case had denied the motion to amend and the Respondent was not forced to defend the new charge at the hearing. This is how the Board got around the due process issue in *Redd-I*:

> By allowing the complaint amendment, we are remanding the case to the judge. Thus, both parties will *now* have the time to prepare and the opportunity to present their cases. That is all that is *required* to establish procedural due process.

Id., at 1117 (emphasis added), citing *NLRB v. Complas Industries*, 714 F2d 729 (7th Cir. 1983) (found a denial of due process because no adjournment was provided to allow the respondent a meaningful opportunity to meet the amended claim).

Time to prepare and an opportunity to present its case and defenses as to Mr. Davis' case – requirements of procedural due process as recognized by *Redd-I* – were not and cannot now be afforded to EYP. The General Counsel's motion to amend with reference to Mr. Davis, first made on the morning of hearing, should be denied.

2. **The ALJ erred in finding and concluding that EYP's Rules prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information," would reasonably be construed to prohibit Section 7 activity and, thus, violate Section 8(a)(1).**

The ALJ properly found that the following rules are set forth in EYP's Employee Handbook (JD 9: 24 – 10: 21):

> (a) Subject: Conduct and Work Rules
>
> To ensure orderly operations and provide the best possible work environment, Ekhaya Youth Project expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. It is not possible to list all forms of behavior that are considered unacceptable in the workplace. The following are some examples of infractions or rules of conduct which may result in disciplinary action, up to and including termination of employment:
>
> . . .
>
> 6. Boisterous or disruptive activity.
>
> . . .
>
> (b) Subject: Professional Ethics
>
> Ekhaya Youth Project staff shall maintain professional ethics and standards at all times and will adhere to the highest moral standards while on duty working. Recognize that youth and families may have suffered a dramatic emotional and/or physical trauma. Ekhaya Youth Project staff are their closest contact for emotional and physical support. Staff must meet their needs for attention and/or assistance without fail, if therapeutic goals are to be attained.
>
> . . .
>
> 8. Inappropriate familiarity among staff members will not occur in the facility or during any program function.
>
> . . .

(c) Subject: Non-Disclosure

> The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project. Such confidential information is includes, but is not limited to, the following examples:
>
> . . .
>
> 4.Personnel Information
>
> . . .

The ALJ also properly found that none of the Rules cited above explicitly prohibit Section 7 activity nor were any of them promulgated in response to protected activity or applied to restrict the exercise of Section 7 rights. (JD 14: 27-29).

However, the ALJ went on to conclude, in reliance solely upon *Lutheran Heritage Village-Levonia*, 343 NLRB 646 (2004), that EYP's Rules prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information" would be reasonably construed to prohibit Section 7 activity and, thus, violated the Act. (JD 14: 19-43).

In *Lutheran Heritage*, the Board affirmed the ALJ's finding that the employer's rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" "were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity." *Id.*, at p. 646.

The Board determined that "a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act" and held that:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted

> that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Id., at p. 647.

Similarly, in the instant case, EYP's challenged rules do not explicitly prohibit Section 7 activity and were not promulgated or applied to prohibit Section 7 activity as expressly found by the ALJ. (JD 14: 27-29).

EYP respectfully submits that its challenge rules in question would not be construed by a reasonable employee to prohibit solicitation of union support or concerted activity aimed at wages, hours and/or working conditions, that is to say, to prohibit Section 7 activity.

In regard to EYP's rules prohibiting "boisterous or disruptive activity in the workplace" and "inappropriate familiarity among staff members," Boisterous activity, disruptive activity, and "inappropriate" familiarity among employees are not inherent parts of Section 7 activity. As EYP's Chief Operating Officer, Mr. Branch, testified, EYP has a youthful employee population who are first entering the professional job market. (Tr. 355). Some deference should be paid to EYP's determination of what is needed to ensure a civil and decent workplace for its youthful employee population and a violation should not be found simply because its rules could conceivably be construed to prohibit Section 7 activity (even though that was not their intent when promulgated and they have never been so applied as expressly found by the ALJ (JD: 14: 27-29)).

In regard to EYP's rule "prohibiting" the disclosure of personnel information (the rule actually calls for "protection" of this information as set forth above), even the ALJ acknowledged that disclosure of some personnel information possessed by virtue of employment

is not protected activity, citing *Ashville School, Inc.*, 347 NLRB 877, fn. 1 (2006); *Clinton Corn Processing Company*, 253 NLRB 622 (1980). (JD 13: 32-39).

Indeed, EYP is required to protect against all unauthorized disclosure of personnel information because Article 1, Section 5, of the Louisiana Constitution guarantees to all of EYP's employees security against "invasions of privacy.[2]" EYP is obligated to protect the personnel information of its employees against disclosure without authorization of its employee. A reasonable employee would not construe EYP's rule to prohibit the voluntary discussion among employees of their own wage or salary information, criminal history, and other personnel information.

There has been no showing that EYP's three challenged rules in question explicitly prohibit Section 7 activity or that they were promulgated or applied to prohibit Section 7 activity. They are simply sought to be made collateral damage in this case. However, there is no basis in the record or in law to support a conclusion that a reasonable employee would construe these rules to prohibit Section 7 activity. For these reasons, EYP respectfully submits that the ALJ's determination to the contrary should be reversed and set aside.

3. The ALJ's Remedy, Order and proposed Notice to Employees are not supported by the record and are erroneous as a matter of law.

If the Board reverses and sets aside the ALJ's findings and conclusions with respect to EYP's rules discussed in the preceding section, then none of the allegations of the Consolidated Complaint shall have been substantiated and it would follow, necessarily, that the entirety of the

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[2] La. Const. Art. 1, §5. Right to Privacy:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. . . .

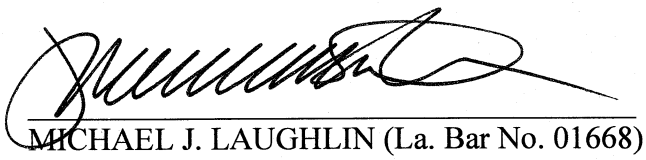
ALJ's Remedy, Order and proposed Notice to Employees should be vacated and set aside.

III. CONCLUSION

EYP's rules prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information" do not prohibit Section 7 activity and do not violate Section 8(a)(1) of the Act. The ALJ's Decision in this regard should be reversed and his Remedy, Order and proposed Notice to Employees vacated and set aside.

In the event that the Board should reverse the ALJ's Decision that the termination of Mr. Nicholas Davis did not violate the Act and dismissal of the Complaint allegation that EYP violated the Act in terminating Mr. Davis, then EYP respectfully submits that the General Counsel's motion to amend with respect to Mr. Davis should be denied.

Respectfully submitted,



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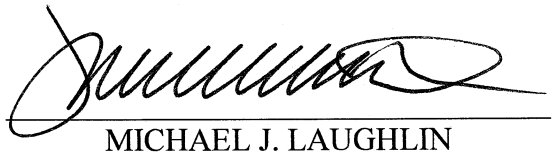
CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Respondent's Post-Hearing Memorandum was filed electronically through the Agency's website on September 12, 2016, which shall constitute service upon the Board and the Regional Office; that a copy has not been served upon Counsel for the General Counsel this same date by e-mail; and that a copy has been served this same date on the Charging Party, Dalana Zipporah Minor, via the U. S. Mail, properly addressed to c/o Paraclete Academy, 207 E Street, South Boston, MA, 02127, and postage prepaid.



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